PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE, *v.* HOME OWNERS' LOAN CORP.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 10. Argued October 12, 13, 1939.—Decided November 6, 1939.

1. The Maryland tax on mortgages, graded according to the amount of the loan secured and imposed in addition to the ordinary registration fee as a condition to the recordation of the instrument, can not be applied to a mortgage tendered for record by the Home Owners' Loan Corporation and securing one of its loans, in view of the provisions of the Home Owners' Loan Act which declare the Corporation to be an instrumentality of the United States and that its loans shall be exempt from all state and municipal taxes. *Federal Land Bank* v. *Crosland*, 261 U. S. 374. P. 29.
2. Assuming that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the power of Congress, the activities of the Corporation through which the Government lawfully acts must be regarded as governmental functions and entitled to whatever immunity attaches to those functions when performed by the Government itself through its departments. P. 32.

   The power of Congress to create a corporation to facilitate the performance of governmental functions implies a power to protect the operations thus validly authorized, which comes within the range of the express power conferred by Const. Art. I, § 8, cl. 18, to make all laws necessary and proper for carrying into execution all powers vested by the Constitution in the Government. In the exercise of this power to protect, Congress has the dominant authority which necessarily inheres in its action within the national field.

175 Md. 512; 2 A. 2d 689, affirmed.

CERTIORARI, 306 U. S. 628, to review a judgment affirming the issuance of a mandamus by Baltimore City Court requiring the Clerk of the Superior Court of Baltimore to record a mortgage.

Messrs. H. Vernon Eney, Assistant Attorney General of Maryland, and *William C. Walsh,* Attorney General,

with whom *Mr. William L. Henderson,* Deputy Attorney General, was on the brief, for petitioner.

The tax is uniform and does not discriminate against the Corporation or the United States.

The tax is not a burden on the Corporation since it could be, and customarily is, paid by the mortgagor.

If the tax is paid by the mortgagor, the effect on the Corporation of collecting the tax from the mortgagor, and the slight increase in the cost of its operations which this might entail, are so speculative, remote and uncertain as to constitute no burden at all in the constitutional sense. *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *Union Pacific Railroad* v. *Peniston,* 18 Wall. 5, 30; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523-524; *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 391–392; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 128; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* 288 U. S. 325, 327–328; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 127; *United States* v. *California,* 297 U. S. 175. In all of these cases the Court has avoided an extension of immunity from tax for fear of crippling the taxing power of either the States or the Federal Government.

The immunity exists only to the extent necessary to prevent undue interference with the operations of the Federal Government. The tax must have a direct and immediate effect upon the operations of the governmental instrumentality; it must restrict, retard, impede or obstruct its activities.

We rely upon *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Silas Mason Co.* v. *State Tax Commission,* 302 U. S. 186; *Atkinson* v. *State Tax Commission,* 303 U. S. 20; *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376; *Helvering* v. *Gerhardt,* 304 U. S. 405; *Allen* v. *Regents of University System of Georgia,* 304 U. S. 439; and *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

From a reading of these cases it is clear that the present tendency is to scrutinize any claim to immunity and allow it only when it is abundantly clear that, otherwise, an unreasonable burden would be imposed on a governmental agency. This is particularly true where immunity would result in a benefit to a private person, but where the burden, if any, on the governmental agency is remote and speculative.

The activities of this Corporation are such that this non-discriminatory tax, laid upon it as well as upon private agencies operating in the money lending field, would not retard, impede or obstruct the operations of the Corporation. *South Carolina* v. *United States,* 199 U. S. 437; *Allen* v. *Regents of University System of Georgia,* 304 U. S. 439.

The distinction drawn, in the case of state agencies, between those exercising proprietary functions and those exercising governmental functions seems to come to no more than this: In the one case it is not necessary to inquire whether a particular federal tax is or is not a burden, for there is no implied constitutional immunity. On the other hand, if a state agency is exercising a governmental function, there is immunity from a tax which is found upon inquiry to impose a direct and palpable burden. The only difference to be noted in dealing with federal agencies is that the Court does not consider that any of them may not be governmental and hence it is necessary in each case to inquire whether or not the state tax in fact does impose a direct and palpable burden upon the federal agency.

Even though the Home Owners' Loan Corporation is a governmental agency, it is still necessary to determine whether or not the challenged tax imposes a direct and palpable burden upon the federal agency, so as to retard, obstruct or impede it in the performance of the functions delegated to it by Congress. The nature of those func-

tions must be examined, and the benefit to be derived from immunity weighed against the detriment to the State, which is coöperating with the Federal Government in the attainment of common governmental ends.

We can not close our eyes to the fact that the Federal Government is daily broadening the sphere of its activities. It is constantly setting up agencies which compete with private agencies engaging in similar activities. Carried far enough, an immunity from tax would deprive the States of their sources of revenues. This is not necessary for the protection of the Federal Government in the performance of the functions delegated to it by the Constitution.

The Home Owners' Loan Act of 1933 does not purport to confer upon the Corporation an immunity from the Maryland tax.

If construed to confer that immunity it is, to that extent, unconstitutional and void. Congress has no power to confer upon agencies of the Federal Government an immunity from state taxation which is broader and more extensive than the implied constitutional immunity. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

Assuming that Congress has the power to authorize the creation of the Home Owners' Loan Corporation to assist needy home owners by refinancing mortgages on their homes, it is, we submit, clear that an immunity from the Maryland recordation tax is not necessary or needful to protect the agency in the performance of that function. If an immunity from taxation is necessary to protect a federal agency in the performance of a governmental function devolved upon it by Act of Congress, then any tax which interferes with the performance of the function constitutes a burden upon the federal agency. If so, there is an implied constitutional immunity from the tax. On the other hand, if the tax does not so interfere, then

it constitutes no burden on the agency and there is no implied constitutional immunity from the tax. But in this event there would be no necessity for an immunity to protect the federal agency in the performance of its governmental functions, and it would therefore not be necessary for Congress to grant such an immunity in order to enable the federal agency to carry on its activities. If there is no such necessity, then clearly the power to grant immunity from tax could not be derived from the implied power of Congress "to do whatever is needful or appropriate to carry out the powers delegated to it by the Federal Constitution."

The idea that the Congress has some power, the limits of which are not defined, to grant an immunity from a tax broader than the implied constitutional immunity, is without foundation. In other words, if we concede the power of Congress to grant to a governmental agency whatever tax immunity is necessary to protect and safeguard that agency in the performance of the governmental functions delegated to it by Congress, we merely concede the implied constitutional immunity from substantial interference. If we go beyond this, then we must say that the Congress has the power to grant not merely an immunity necessary to protect the agency in the performance of its governmental functions, but an unlimited immunity. Such a rule would have disastrous consequences.

A statutory declaration of immunity may therefore be treated as an expression of congressional opinion as to the necessity for immunity, or as negativing any implication of a waiver of the immunity by Congress, or both. But beyond this point we submit that the question of whether immunity exists in any particular case depends upon whether it can be implied from the Constitution, and in every case this is a judicial and not a legislative question.

Solicitor General Jackson, with whom *Assistant Attorney General Clark* and *Messrs. Sewall Key, Warner W. Gardner, Berryman Green,* and *Harold Lee* were on the brief, for respondent.

Petitioner does not challenge the constitutionality of the Home Owners' Loan Act of 1933, as amended. It follows that the Corporation shares the full immunity from state taxation which attaches to the operations of the United States. Its functions are necessarily "governmental," since they are in exercise of the delegated powers of the Federal Government. Since it is wholly owned and controlled by the Government, its corporate organization does not affect the governmental nature of its activities. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 477.

Congress has full power to determine whether the recordation of these mortgages should be exempt from or subject to state taxation; and the question of tax immunity or liability is simply one of Congressional intent. *Helvering* v. *Gerhardt,* 304 U. S. 405, 411–412. Such was the decision in *Federal Land Bank* v. *Crosland,* 261 U. S. 374.

The laws of the United States are declared by the Constitution to be "the supreme law of the land." If Congress had expressly declared that the recordation of these mortgages should be exempt from state taxation the Maryland tax would fall, since the provision could not be declared to have no reasonable relationship to the ends promoted by the Corporation.

The doctrine of immunity of federal instrumentalities from state taxation was developed simply as an attribute of the supremacy clause of the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316, 426, 427, 433. Not until *Collector* v. *Day,* 11 Wall. 113, did the Court ascribe immunity to the more nebulous implications of a federated constitution. But even after that decision, and notably

of late, the Court has continued to recognize the historic and specific basis for federal tax immunity. Thus, Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach. In other cases, the Court has recognized the power of Congress to create an immunity for private persons who dealt with the Government and have held the taxpayer liable because Congress had provided no such immunity; correlatively, the Court has extended immunity to such private persons because Congress had declared that they should not be subject to state taxation. With these broad powers as to the tax immunity even of private persons, simply because they deal with the United States, it follows *a fortiori* that Congress has full power to provide either tax immunity or liability for the property and operations of the Government itself.

The ultimate incidence of a tax can not ordinarily be determined with categorical exactness. In the case of the Maryland tax here involved, it is wholly impossible to determine on *a priori* grounds whether the economic burden will ultimately rest upon the Corporation or upon its borrowers. Even if the tax could be precisely allocated, it is impossible to measure the extent to which it is an interference with the governmental functions of the Corporation in providing credit relief for distressed home owners. The decision of these questions, impossible of exact answer, is committed to Congress alone.

The Constitution, in giving to Congress this power, has not placed the States in jeopardy. From the beginning it has been recognized that Congress, by its very nature, represented the interests of the States as well as those of the National Government. *McCulloch* v. *Maryland,* 4 Wheat. 316, 435–436; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–413, 416. And in practice, Congress has many times waived an immunity which otherwise would attach to federal instrumentalities; indeed, in the last three

Congresses some thirty-two statutes contain such a waiver.

The question, therefore, is simply one of Congressional intention. No private person should be exempt from non-discriminatory taxation simply because he deals with the Government; but the Government itself should not in the absence of a clear consent be forced to account to the tax collector of a State. It would be anomalous for the operations of the United States, buttressed by the supremacy clause, to be subject to a compulsory exaction by an independent sovereign. The delay and accounting burdens, the necessity of opening the Government's books to numerous tax officials, and the burden of numerous and protracted suits, would combine to impose a staggering obstacle to the efficient conduct of the nation's business, which reaches into every taxing jurisdiction in the United States.

It is, we believe, because of these considerations that so marked a contrast appears in the decisions of this Court which deal, on the one hand, with the tax immunity of private persons and, on the other hand, with that of the Government itself. Because of the strong reasons for such an immunity and because of the unbroken consistency of the decisions of this Court, Congress can be taken to have intended a different rule only when the waiver of immunity is clear. *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, dealt with the immunity of a private person from taxation simply because he chanced to deal with the Government.

Section 4 (c) of the Home Owners' Loan Act of 1933 contains nothing to destroy this normal implication of immunity; on the contrary its language points with compelling force to a Congressional desire for immunity. The fragmentary legislative history points to a similar conclusion. Cf., *Baltimore National Bank* v. *Tax Commission,* 297 U. S. 209.

The omission of a specific exemption for mortgages, found in the Federal Farm Loan Act and relied upon in *Federal Land Bank* v. *Crosland,* 261 U. S. 374, indicates no desire to waive their immunity.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Home Owners' Loan Corporation brought this proceeding in the Baltimore City Court for a writ of mandamus requiring the Clerk of the Superior Court of Baltimore to record a mortgage executed to the Corporation upon the payment of the ordinary recording charge and without affixing stamps for the state recording tax. Demurrer to the petition was overruled, the Clerk did not avail himself of the opportunity to answer, and mandamus was granted. The order was affirmed by the Court of Appeals. 175 Md. 512; 2 A. 2d 689. We granted certiorari. 306 U. S. 628.

The Maryland statute imposes a tax upon every mortgage, recorded or offered for record, at the rate of ten cents for each $100, or fraction thereof, of the principal amount of the debt secured by the mortgage.[1] As the Home Owners' Loan Corporation is expressly declared to be an instrumentality of the United States (Home

[1] The Act provides for a "Tax on the Recordation of Instruments in Writing" as follows:

"A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of

Owners' Loan Act of 1933, c. 64, 48 Stat. 128) and the mortgage was acquired in that capacity, the Court of Appeals held the tax as thus applied to be invalid.

The court relied upon our decision in *Federal Land Bank* v. *Crosland,* 261 U. S. 374. The question there related to a tax imposed by Alabama as a condition for the recording of a mortgage executed to a Federal Land Bank. The Federal Farm Loan Act of 1916 provides that first mortgages executed to Federal Land Banks shall be deemed "instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation." 39 Stat. 360, 380. We held that the state tax, as distinguished from a reasonable fee to meet the expenses of the registry, constituted a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it, and that the tax on the mortgage in question was beyond the power of the State.

Petitioner suggests that the *Crosland* case may be distinguished; that the Alabama tax was imposed on the lender, whereas the Maryland tax is on the privilege of recording the instrument and the statute is silent as to

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mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction."

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt."

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record." Acts of 1937, Chap. 11, Code of Maryland, Art. 81, § 213.

The same Act, in § 214, provides for the affixing of stamps to cover the tax and makes it unlawful for any person to record any written instrument without providing for the payment of the tax, as stated.

the one who shall pay the tax; also that the Federal Farm Loan Act expressly declared the mortgages of Federal Land Banks to be instrumentalities of the Federal Government. The Court of Appeals thought these differences to be immaterial. As to the first, the court rightly observed that in the *Crosland* case the provision for the payment of tax by the lender was regarded as having no determining significance. We said that "whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States." 261 U. S., pp. 378, 379. Here, also, the tax is imposed upon the mortgage and is graded according to the amount of the loan,[2] and the condition attached to the registration is a practical method of collection. The recording sought was for the protection of the interest of the Home Owners' Loan Corporation. In fact, the mortgage in the instant case was offered for record by the Corporation and the tax was demanded from the Corporation.

The second suggested distinction rests upon the terms of the Home Owners' Loan Act. That provides[3] that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is *"loans."* We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation "shall be secured by

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[2] See Note 1.

[3] Section 4 (c) of the Home Owners' Loan Act provides: "The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or

a duly recorded home mortgage." [4] Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the *Crosland* case.

Alive to this consideration, petitioner advances a broader contention, asking us to review and overrule the *Crosland* decision as being out of harmony with correct principle. Petitioner insists that the tax is not discriminatory; that it does not impose a burden upon the Home Owners' Loan Corporation; and that if the Act of Congress be construed as conferring an immunity, it went beyond the power of Congress, as Congress cannot "grant an immunity of greater extent than the constitutional immunity."

We assume here, as we assumed in *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, 422; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 208, 209; *Graves v. New York ex rel. O'Keefe, supra.* Congress has not only the power to create a corporation to facilitate the performance of gov-

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by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed." 48 Stat. 128, 130; 12 U. S. C. 1463.

[4] § 4 (e) (f); 48 Stat. 131; 12 U. S. C. 1463 (e) (f).

ernmental functions, but has the power to protect the operations thus validly authorized. "A power to create implies a power to preserve." *McCulloch* v. *Maryland, supra,* p. 426. This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, § 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. *The Shreveport Case,* 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g., *Bank* v. *Supervisors,* 7 Wall. 26, 31; *Choate* v. *Trapp,* 224 U. S. 665, 668, 669; *Smith* v. *Kansas City Title Co., supra,* p. 207; *Trotter* v. *Tennessee,* 290 U. S. 354, 356; *Lawrence* v. *Shaw,* 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

The judgment of the state court is

Affirmed.

MR. JUSTICE BUTLER took no part in the consideration and decision of this case.